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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 500

MAX EISENBERG, on behalf of himself and all other stockholders of Central Zone Property Corporation, similarly situated,

Petitioner,

against

CENTRAL ZONE PROPERTY CORPORATION,

Respondent,

and

JOSEPH COHEN,

Referee-Respondent,

and

S. H. SCHEUER, MILLARD SHRODER and WILLIAM C. RUTH,

Defendants.

AND ANOTHER ACTION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK*

Petitioner, Max Eisenberg, prays that a writ of certiorari issue to review the judgment of the Court of

* Portions of the record herein are in each of said courts.

Appeals of the State of New York, entered, in the above-entitled case on May 9, 1957, upon which a rehearing was denied on July 3, 1957. The judgment denies petitioner a fee for beneficial legal services rendered in two successful stockholders' actions.

Citations to Opinions Below

The opinion of the Supreme Court of the State of New York is unreported, and is printed in Appendix A, *infra*, p. 12. The opinion of the Appellate Division modifying the holding of the Supreme Court is reported, *Eisenberg* v. *Central Zone Property Corporation*, 1 A. D. 2d 353, 149 N.Y.S. 2d 840 and is printed in Appendix A, *infra*, p. 18. The affirmance, without opinion, by the Court of Appeals of the Appellate Division's holding is reported in 3 N. Y. 2d 729. Its denial of a rehearing is not yet reported.

Jurisdiction

The Judgment of Affirmance of the Court of Appeals of the State of New York, was entered on May 9, 1957 and the order denying rehearing was entered on July 3, 1957. Appendix A, pp. 26, 23. Jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) (since the denial of the equal protection of the laws to the petitioner is drawn into question).

Questions Presented

1. Whether, absent misconduct on the part of a plaintiff-attorney, who is a small stockholder in and who renders beneficial legal services to a corporation in a successful stockholders' derivative action, and absent a violation of public policy, the courts can properly deny compensation for said services of said attorney:

   a) where they have awarded compensation for similar services of other counsel in the same action.

b) solely because he was also the instigating stockholder plaintiff in said action,

c) solely because his stockholdings in said corporation were small.

d) because he was the instigating stockholder and his stockholdings were small.

2. Whether the courts can properly award compensation for legal services in a stockholders' derivative action, upon condition that no suit be brought, on corporation's behalf, to recover any money illegally expended in the attempted consummation of the illegal plan enjoined.

Constitutional Section Involved

The statutory provision involved is the Fourteenth Amendment, Section 1, of the Constitution of the United States. The pertinent portion of said section reads as follows:

> "• • • No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

Statement

Petitioner, an attorney, owning 5 shares of the corporate respondent's 21,165 shares of outstanding stock for more than 20 years, successfully prosecuted two stockholders' derivative actions, enjoining the illegal transfer of all of said respondent's property (*Eisenberg* v. *Central Zone Property Corporation*, 203 Misc. 59, 116 N.Y.S. 2d 154;

rev. 281 A. D. 817, 118 N.Y.S. 2d 919; rev. 306 N. Y. 58, 115 N. E. 2d 652) (R. 2947-2981). Petitioner was the sole instigating plaintiff in said actions. Respondent corporation had some 700 stockholders. Its property was worth in excess of $3,000,000 (R. 511).

Said actions were, throughout, conducted in the name of Frank S. Samansky, Esq. an associate of petitioner's, as attorney of record. Petitioner, however, was in control of said actions and performed almost all of the legal services required in their prosecution until about one week prior to argument in the Court of Appeals, when he engaged Emil K. Ellis, Esq. as of counsel (R. 308, 317). Thereafter, petitioner and Mr. Ellis acted as co-counsel. Mr. Samansky performed some minor services (R. 466, 467, 473, 474, 477, 589-592, 1000, 1070, 1072).

Upon petitioner's application for an allowance of compensation for all legal services rendered in the actions (R. 57, 58, 208-372), a referee was appointed to "hear and report as to the reasonable value of the legal services rendered in the above described actions * * *" (R. 269). He reported the reasonable value of said services, including petitioner's, to be $25,000 and recommended same on condition that neither petitioner or any other stockholder of respondent, commence any suit, on respondent's behalf, to recover any fees or other disbursements made by respondent's officers or directors as a result of or in connection with the illegal plan enjoined or these litigations (R. 2550-2551). He specifically found that petitioner was acting in good faith in bringing these actions (R. 2375) and that the services were beneficial to respondent corporation (R. 2546, 2547).

The court below, in confirming the referee's report, adopted same in toto (R. 2850) stating, in doing so, "* * * I concur in the view that the plaintiff and his attorneys are entitled to compensation for their services * * *" (R. 2848). Appendix A, page 13.

On cross-appeals from the order confirming the referee's report, the Appellate Division held that petitioner's small stockholdings in respondent corporation cast "considerable doubt" upon his good faith in instituting the actions; that in no instance is a stockholder himself entitled to any separate compensation (citing the case of *Trustees* v. *Greenough*, 105 U. S. 527 in support of said holding); and that there is a serious question whether, as a matter of public policy, a stockholder, instituting a derivative action, should be allowed compensation as an attorney in the litigation (R. 3059-3062). Appendix A, p. 16. It refused to allow any compensation for petitioner's legal services. Because of the circumstance, however, that "outside" counsel (Mr. Ellis) had been retained prior to argument in the Court of Appeals, it allowed $5,000 for legal services. It made no reference whatever to the condition, *supra*, upon which compensation had been awarded. Its order of modification was affirmed, without opinion, by the Court of Appeals on May 9, 1957. Appendix A, p. 20. On July 3, 1957, the Court of Appeals denied a timely application for a rehearing. Appendix A, p. 23.

The Federal Question Involved

The question of the equal protection of the laws was raised in the following manner:

In the Appellate Division, petitioner challenged that portion of the referee's report (confirmed by the lower court, Appendix A, p. 12) which conditioned the $25,000 awarded the petitioner upon the stockholders of respondent corporation being,

> "barred from further litigation to recover on behalf of the corporation from any officers, directors or other persons any fees, disbursements or expenses paid out by the corporation as a result of this litigation or for

> **the conduct of this litigation, or for the purpose of putting into effect the plan herein * * * or to restore the status quo * * *" (R. 2550, 2551).***

This is a patent denial of the protection of the laws to the petitioner and the respondent *cestui que* trust.

Prior to the decision of the Appellate Division, petitioner had been awarded compensation for his legal services (albeit he deemed the amount inadequate). The denial of equal protection of the laws with respect to compensability of his services was therefore not then in question. It first came into question with the denial by that body, of compensation to plaintiff (and the granting of compensation for legal services other than petitioner's). Appendix A, pp. 16, 17. Petitioner raised this question in his brief to the Court of Appeals, pages 5 and 6, when he argued

> "While an attorney may not solicit litigation, he is not, and * * * should not be required to forego proper and meritorious sources of compensation * * * because he is, among many others, a wronged stockholder * * *."

And in his brief on reargument to the Court of Appeals, petitioner argued pages 7, 8

> "* * * The Appellate Division did *not* find (indeed it could not) that the services plaintiff rendered were personal and not legal; it did *not* find the plaintiff guilty of bad faith; it did *not* find that compensation to a stockholder-attorney who renders legal services in the litigation, is against public policy; it did *not* find that plaintiff's small holdings were a bar to compensation for legal services rendered (although it mis-

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* Neither the Appellate Division nor the Court of Appeals, in their decisions or orders, made any disposition with respect to these conditions. Whether or not this disability inheres in the present judgment is not clear.

takenly pointed to that fact as the sole reason for holding that 'considerable doubt' is cast upon plaintiff's good faith). Its disallowance of compensation for plaintiff's legal services was an arbitrary one, unsupported in law and equity and completely contrary to existing law as established by *Rogers* v. *Hill* (34 F. Supp. 358) and Ontjes v. McNider, 234 Iowa 208, 12 N. W. 2d, 284 (1943). It deprived plaintiff of the equal protection of the existing laws solely, apparently, because of plaintiff's limited holdings."

At page 10 of the said brief it was argued that petitioner had done everything that a most skillful "non-stockholder-attorney" could have done in the interest of the corporation, and yet was being denied equal treatment with a non-stockholder-attorney.

It is submitted that implicit in the very issue herein is the question of equal protection of the laws as set forth in the 14th Amendment of the Constitution of the United States.

Reasons for Granting Writ

1. **The decision of the State Court misapplies this Court's holding in *Trustees* v. *Greenough*, 105 U. S. 527, 26 ed. 1157, see Appendix B, *infra*, page 24 and is in direct conflict with the holding in *Rogers* v. *Hill*, 34 F. Supp. 358 (S.D.N.Y., 1940).**

The Appellate Courts, in citing the *Greenough* case, *supra*, as authority for the principle that a lawyer-stockholder, rendering beneficial services in a stockholders' action, may not be compensated for said services, completely misinterpreted it. It had no application to the instant case at all. In the *Greenough* case (a representative bondholder's action), this Court approved the payment of compensation for legal services rendered in the action. It disapproved separate compensation for the personal serv-

ices of the non-attorney instigating plaintiff (which consisted of an allowance of $2,500 per year, for 10 years, plus $15,000 for hotel and railroad expenses). Here, petitioner is not seeking compensation for personal services. He is seeking compensation solely for legal services which had resulted in benefit to respondent corporation and all its stockholders.

Rogers v. *Hill, supra,* is directly in point. There, plaintiff, an attorney, as the sole plaintiff-litigant, instituted a series of derivative actions against a corporation. Plaintiff had less than 1/10,000 of 1 percent stock interest in said corporation at the commencement of the actions (*Rogers* v. *Hill,* 53 F. 2d, 396; 60 F. 2d, 113). Plaintiff appeared *pro se* in all the courts (*Rogers* v. *Hill,* 143 Misc. 306; 333 A. D. 708; 53 Fed. Rep. 2d 395; 60 F. 2d 113, 289 U. S. 582) and did all of the legal work himself. A very substantial fee to him for legal services was approved by the court, notwithstanding his good faith and his frankness with the court were vigorously challenged.

The only other case in point brought to the State Courts' attention (in which a participating stockholder-attorney petitioned for a fee for legal services in a stockholders' action) was the case of *Ontjes* v. *McNider,* 234 Iowa 208, 12 N. W. 2d 284 (1943), in which the point in question was most exhaustively analyzed. The attorney-stockholder was there, too, allowed a fee.

2. The question involved is of major significance. Besides involving basic public policy, it is of vital concern to all attorneys who own stock.

Proper stockholders' suits serve a therapeutic purpose and are encouraged. (*Brendle* v. *Smith,* 46 F. Supp. 522, 525-26.)

A small stockholder, who is not an attorney, faces many difficulties in the institution of a stockholders' suit. There

is a natural disinclination to become involved with attorneys because of the demand of time and money it makes. There is a possibility that (assuming he can meet the security requirements under section 61b of the General Corporation Law of New York), if unsuccessful, he may suffer much greater damage than he, personally, can profit by the suit. There is the difficulty of obtaining competent, established counsel on a contingent basis (especially if the corporation is not large). The "realistic" small stockholder will often suffer exploitation rather than pursue the more burdensome and expensive remedy of justice. An attorney-stockholder, with small stockholdings, would very likely come to the same conclusion, if there were not the possibility of fee in the event of success. The small stockholder needs protection.

Holding that an attorney-stockholder may not be compensated for legal services, not only penalizes him for being an attorney, it compels him to place control of his claim in the hands of counsel less competent than he may think himself to be and to contribute such legal services as he can gratis. The alternative to this would be either to prosecute the action gratis, or docilely permit his corporation, his co-stockholders and himself to be plundered. In these days of corporate manipulation, the possibility of corporate plunder is not remote. Furthermore, it ignores the fact that said services benefit the corporation and its stockholders and that they should properly pay for same from the common fund.

Stockholders' suits may not be settled or attorneys' fees fixed, in New York, without the consent of the court. Rules of Civil Practice, 301. Small stockholders are already required to post security in stockholders' actions. General Corporation Law, 61b. Hence, the strike suit is no longer the factor that it formerly was. An attorney-stockholder contemplating the institution of litigation would, of necessity thoroughly examine the merits of his position before doing so.

Attorney-stockholders may well be the last bulwark of the small stockholder. To discourage their initiation of meritorious stockholder litigation, is to stimulate borderline or improper manipulation in the small public corporations.

3. There is no adequate non-federal ground upon which this ruling may be supported.

As previously shown, in all cases cited to the state courts, the plaintiff-attorney-stockholder was awarded a fee for his beneficial legal services. The holding here, that the limited stock interest of the petitioner casts doubt upon his good faith is not only contrary to Federal and New York Law. (*Ashwander* v. *T.V.A. et al.*, 297 U. S. 288, 80 L. ed. 688; *Everett* v. *Phillips*, 288 N. Y. 227, 233; *Kaufman* v. *Wolfson*, 1 App. Div. 2d 555, 151 N.Y.S. 2d 530, 531; *Rosenfeld* v. *Fairchild Engine Corp.*, 116 N.Y.S. 2d 840, 843, aff'd 284 App. Div. 201, 132 N.Y.S. 2d 273, aff'd 309 N. Y. 171; *Rogers* v. *Hill*, 134 F. 2d 358, 363), it is basically contrary to the rights guaranteed under the Fourteenth Amendment.

Motive has been held to be immaterial in the bringing of a stockholders' suit. *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, 193; *Johnson* v. *King-Richardson Co.*, 36 F. 2d 675; *Gottfried* v. *Gottfried*, 112 N.Y.S. 2d 431 (Sup. Ct. 1952). Even the affirmative purpose of earning a fee would not be an indication of bad faith in a meritorious action. Success in a stockholders' suit and bad faith in its initiation are mutually exclusive.

The failure of the state courts to rule whether public policy did or did not warrant awarding petitioner a fee (Appendix A, p. 10) was an arbitrary failure to determine a proper justiciable issue, substantially affecting petitioner's rights and was a denial to petitioner of the protection of the laws. The refusal to grant the fee was an

arbitrary one, not warranted in law or discretion, *Bunim v. Bunim*, 298 N. Y. 391, 393, 394. The award of compensation for legal services of another counsel in the same action (whose rights derived from petitioner) was a discrimination against petitioner, unfounded in law or equity and violative of the Fourteenth Amendment as well as the established common law.

There is no basis in any state law for the provision prohibiting petitioner or any other stockholder of respondent corporation from instituting a derivative action on said corporation's behalf, under penalty of forfeiting a proper legal fee. The provision is repugnant to the Fourteenth Amendment of the Constitution of the United States.

CONCLUSION

For the foregoing reasons, this petition for certiorari, should be granted.

September 20, 1957.

Respectfully submitted,

EMIL K. ELLIS,
Counsel for Petitioner.

FRANK S. SAMANSKY,
Attorney for Petitioner,
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New York 38, N. Y.

APPENDIX A

Opinion and Decision of Lower Court on Motion to Confirm and on Cross-Motion to Vacate or Set Aside Referee's Report

Eisenberg v. Central Zone Property Corp'n—Motion by defendants to modify and confirm as modified the report of a referee appointed to hear and report as to the reasonable value of the legal services rendered to the Central Zone Corporation by the attorneys for plaintiff in the above-entitled stockholders' actions; cross-motion by plaintiff to vacate and set aside or, in the alternative, to modify the report.

The defendants contend that the attorneys for plaintiff are not entitled to compensation: First, because the services rendered produced no pecuniary benefit to the corporation, and, secondly, because the actions were not instituted and carried on in good faith.

While there is support in some of the earlier cases for the view that where the services rendered have resulted in no pecuniary benefit to the corporation, the attorneys representing the plaintiff in stockholders actions are not entitled to an allowance (*Runcie v. Bankers Trust Co.*, 16 N. Y. S. 2d 917, re-arg. denied 17 N. Y. S. 2d 196; *Southern Railway Co. v. Peck*, 178 Misc. 638, 640), the better rule, as enunciated by the latter cases, is that where a stockholder's action is brought in good faith and has resulted in some benefit to the corporation, even though not pecuniary or measurable in dollars and cents, it is equitable that all who share in the benefit should contribute to the reasonable expenses of the litigation (*N. Y. Central RR Co. v. N. Y. & Harlem RR Co.*, 275 App. Div. 604, 608-609, aff'd 301 N. Y. 567, revg. 193 Misc. 795; *Martin Foundation v. Phillips-Jones Corp'n*, 204 Misc. 120, mod. 283 App. Div. 729, aff'd 306 N. Y. 972; *Abrams v. Textile Realty Corp'n*, 97 N. Y. S. 492, 495, 496-497; N. Y. L. J., October 16 1950, p. 812).

Obviously, where the resulting benefit is the creation of a fund, the reduction or cancellation of a debt, the prevention of a loss, the defeat of an adverse claim or other pecuniary benefit, there is some tangible basis for arriving at the reasonable value of the services rendered; but where, as here, the alleged benefit is non-pecuniary, difficulty is likely to be encountered in evaluating the services rendered. Thus, in the instant situation, the plaintiff and his attorneys were successful in setting aside as illegal a plan, which was devised for the purpose of avoiding a double tax on the sale of all the real property owned by the corporation and the consequent dissolution of the corporation. The plan was devised in good faith by the directors, with the advice of counsel. Special Term found part of the plan valid and part of it invalid (203 Misc 59); the Appellate Division held the entire plan valid (281 App. Div. 817); the Court of Appeals struck it down entirely (306 N. Y. 58). The difficulty of estimating the reasonable value of the services rendered under these circumstances is obvious. Such difficulty undoubtedly accounts for the disparity between the allowance to which the attorneys for plaintiff believe they are entitled and the amount actually fixed by the referee.

While I concur in the view that the plaintiff and his attorneys are entitled to compensation for their services, I feel, as the referee does, that the fact that the litigation has resulted in no pecuniary benefit to the corporation is a circumstance to be considered in determining the amount of the allowance (see *Martin Foundation v. Phillips-Jones Corp'n, supra*). So, also, are the facts that plaintiff is an attorney; that he himself instituted the action; that he personally performed the great bulk of the services rendered, and that he did not call in specialists in this field of litigation until shortly before the argument of the appeal in the Court of Appeals. Certainly, there can be no compensation if a stockholder's action is instituted in

bad faith; nor if a plaintiff, especially if an attorney, merely succeeds in vindicating the legal position taken by him; nor if the result is a Pyrrhic victory.

It goes without saying that I have given the question of compensation considerable attention. The briefs and argument of counsel have been very helpful, and so has the report of the referee. Indeed, I have been so impressed with the referee's report that I have decided to adopt its conclusions and recommendations *in toto* and to fix the reasonable value of the services rendered in the sum of $25,000, together with interest from September 30, 1952, the date of the entry of the original judgment based upon the decision of this court.

As for the issue of good faith, I feel obliged to admit that it did present a rather troublesome question. For that reason, among others, I have decided to follow the recommendation of the referee that the matter of compensation should await the outcome of all the litigation pending between the parties. Indeed, that was the principal reason why I denied the plaintiff's motion for an allowance pending the appeal to the Court of Appeals (see N. Y. L. J., January 6, 1953, p. 40). I then felt that the question should not be decided in a piecemeal fashion. I am still of the same opinion, especially since the good faith of the plaintiff in instituting and carrying on these actions is vigorously challenged. Nor are the arguments in support of that contention without merit.

Settle order in accordance herewith on ten days' notice to the attorneys and to the referee, who shall serve and file his affidavit of services five days after the receipt of the notice of settlement. There shall also be submitted affidavits of the parties as to the nature and status of any pending litigation.

Order of Lower Court Confirming Report of Referee and Awarding Petitioner a Legal Fee.

At a Special Term, Part I of the Supreme Court, New York County, held at the County Courthouse, Foley Square, Borough of Manhattan, City and State of New York, on the 22nd day of July, 1955.

Present: HON. FELIX C. BENVENGA, Justice.

[TITLED IN BOTH ACTIONS]

The plaintiff having moved this Court for an order directing an allowance as and for compensation for legal services rendered in the above entitled actions, including expenses or such other amounts as this Court shall determine to be reasonable and that the defendant, Central Zone Property Corporation, and/or the defendant, Central Zone Realty, Inc., pay such compensation and expenses, and decision on said motion having been deferred pending the final determination of the issues in the above entitled actions, and the Court of Appeals having determined the said issues in favor of the plaintiff, and this Court having appointed Joseph Cohen, Esq., as referee to take testimony and hear and report to this Court as to the reasonable value of the legal services rendered on behalf of the plaintiff, and it having been stipulated by the parties that the said Referee be authorized and empowered to hear and report also as to the reasonable value of the legal services rendered on behalf of plaintiff, subsequent to November 10, 1952, the date of the prior application, and testimony having been taken before the said Referee and the said Referee having rendered a report, stating the sum of $25,000 with interest from September 30, 1952, to be the reasonable value of all the legal services performed on behalf of the plaintiff which were reasonably necessary to the result accomplished, and the defendants having moved this Court to modify said report of the Referee by finding

the reasonable value of said legal services to be zero and as so modified, to confirm said report, and the plaintiff having cross-moved this Court to vacate and set aside said report in its entirety, or in the alternative, to modify said report by finding, amongst other things, the reasonable value of said legal services to be $250,000 plus the reasonable value of the legal services rendered on the appeals herein, subsequent to November 10, 1952, and the Court having rendered a decision adopting the Referee's report *in toto*, now

On reading and filing the notice of motion, dated November 10, 1952, and the affidavits of Max Eisenberg, sworn to November 10, 1952, November 18, 1952, and December 5, 1952, respectively, and letters dated December 8, 1952, and February 19, 1952, in support thereof and the affidavit of Simon H. Rifkind, sworn to December 5, 1952, and the affidavit of William C. Ruth, sworn to December 28, 1952, in opposition thereto, and upon the order made and entered herein on January 5, 1953, deferring a decision on plaintiff's said motion, pending decision and argument on appeal, upon the notice of appeal, dated January 19, 1952, appealing from said order, upon the order dated January 21, 1954, appointing Joseph Cohen, Esq. Referee herein, upon the affidavits of Max Eisenberg and Emil K. Ellis, each sworn to the 13th day of September, 1954, the transcript of the testimony before the said Referee, the report of said Referee made and entered herein on the 18th day of January, 1955, the notice of motion of the defendants dated March 10, 1955, and the affidavits of Bernard H. Greene, sworn to March 10 and March 31, 1955, respectively, in support thereof, in support of defendants' motion to modify the report of the Referee and notice of cross-motion of plaintiff, dated March 22, 1955, and the affidavit of Max Eisenberg, sworn to March 22, 1955, in support of plaintiff's cross-motion to vacate and set aside

the report of the Referee, or in the alternative, modify same, the decisions of Special Term (203 Misc. 59), the Appellate Division (231 App. Div. 817), and the Court of Appeals (306 N. Y. 58), and the decision of this Court, dated June 7, 1955, and upon the affidavit of Joseph Cohen, of services, sworn to the 21st day of June, 1955, the affidavit of Max Eisenberg, sworn to the 30th day of June, 1955, and the affidavit of Bernard H. Greene, sworn to the 30th day of June, 1955,

On motion of Paul, Weiss, Rifkind, Wharton & Garrison, Esqs., attorneys for the defendants, it is

ORDERED, that the said report of the Referee be and it is hereby in all respects confirmed, and it is further

ORDERED, that there be allowed and paid to the plaintiff by the defendant, Central Zone Property Corporation, as and for compensation for legal services rendered in the above entitled actions, the sum of $25,000, with interest F.C.B. there- to the date of the entry of this order on from the 30th day of September, 1952, said compensation to await the outcome of all litigation between the parties, and it is further

~~ORDERED, that the sum of $; is hereby fixed and allowed the plaintiff as reasonable and necessary expenses~~ F.C.B. ~~of the hearings before the Referee (including the cost of the expert testimony rendered therein) and the actions, and it is further~~

ORDERED, that the compensation of Joseph Cohen, Esq., F.C.B. for his services as Referee herein be and the same hereby is fixed at $6,000, said sum to be paid him by the defendant, Central Zone Property Corporation.

Enter:

Filed July 22, 1955 F C B
New York County Clerk's Office

Appendix A

Opinion of Appellate Division Disallowing Fee for Petitioner's Services

Reported in 1 App. Div. 2d 353, 149 N.Y.S. 2d 840

PER CURIAM.

In confirming the report of the referee appointed by it, Special Term allowed plaintiff $25,000 for legal services rendered by him in connection with the prosecution of two derivative actions which he brought as a minority stockholder of the defendant corporation. Plaintiff appeals from the order on the grounds that the allowance was inadequate, that interest thereon should not be limited and that the condition of payment awaiting the outcome of the litigation was improper; defendant, on the ground that no allowance was justified.

The defendant real estate corporation had proposed a plan of liquidation to dispose of its sole asset, a twenty-four story loft building on East 45th Street, New York City, in such manner that the proceeds thereof would be subject to but one capital gains tax, by the device of transferring it to a Delaware corporation and in return having the entire stock held under a voting trust agreement, certificates of which would be issued to the stockholders in New York.

The legality of this proposal was challenged by the plaintiff in two actions which resulted in the Court of Appeals reversing this Court, in effect holding the proposed transaction illegal because of noncompliance with Stock Corporation Law, § 20. Eisenberg v. Central Zone Property Corporation, 306 N. Y. 58, 115 N. E. 2d 652.

These proceedings, instituted on papers endorsed with an attorney's name as attorney of record, were conducted by plaintiff himself up until the time of argument in the Court of Appeals for which purpose he retained coun-

sel. His application for compensation for services rendered by him was referred to a referee whose report, thereafter confirmed, stated that no pecuniary benefit accrued to the defendant corporation, a finding which we confirm. Nevertheless, in reliance upon Martin Foundation, Inc. v. Phillips-Jones Corp., 204 Misc. 120, 123 N. Y. S. 2d 222, modified 283 App. Div. 729, 127 N. Y. S. 2d 649, affirmed 306 N. Y. 972, 120 N. E. 2d 230, the referee recommended, and Special Term awarded, the amount of compensation in controversy here.

[1, 2] Generally, where a stockholder's action is successful and it is established that a pecuniary benefit to the corporation results, a stockholder is compensated for the moneys paid to his attorney but in no instance is the stockholder himself entitled to any separate compensation. Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157. Here plaintiff's holding consisted of only five shares of stock out of a total of 21,000 shares issued—less than 1/40th of 1% of the entire issue. In such case, the interest of the stockholder being as limited as that of the plaintiff, considerable doubt is cast upon his good faith in instituting a stockholder's derivative action and where that interest is actually so minute that the result of the proceedings would confer an inconsequential benefit on him, the Court is not inclined to award compensation for legal services rendered by a stockholder acting as his own attorney. There is a serious question in our mind, as a matter of public policy, whether a stockholder instituting a derivative action against a corporation should even be allowed compensation as an attorney in the litigation. Certainly the institution of such actions and the undertaking of litigation for the purposes of seeking a counsel fee should not be encouraged.

[3] In the instant case, however, counsel had been retained just prior to argument in the Court of Appeals,

Because of this circumstance, the order of July 22, 1955, is modified by fixing compensation for legal services in the amount of $5,000. Interest is fixed from the date of entry of the order of Special Term awarding compensation and the condition on payment is eliminated. As so modified the order should be affirmed with costs to defendant-respondent-appellant. Settle order.

The appeal from the order of January 5, 1953, is dismissed.

Order of July 22, 1955, unanimously modified in accordance with the opinion herein and, as so modified, affirmed with costs to the defendant-respondent-appellant. Settle order on notice. Appeal from order of January 5, 1953, unanimously dismissed. No opinion. Order filed.

Appendix A

Order of Appellate Division Disallowing Fee for Petitioner's Services.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 29th day of March, 1956.

Present: Hon. David W. Peck, Presiding Justice.
" Bernard Botein,
" Benjamin J. Rabin,
" Joseph A. Cox,
" Martin M. Frank, Justices.

[DOUBLE CAPTION]

Appeals having been taken to this Court by plaintiff-appellant-respondent, Max Eisenberg, and by the defendants-respondents-appellants, Central Zone Property Corporation and Central Zone Realty, Inc., from an order of the Supreme Court, New York County, entered July 22, 1955, confirming in all respects the report of a Referee appointed to hear and report as to the reasonable value of the legal services rendered on behalf of the plaintiff; allowing plaintiff the sum of $25,000 as compensation for legal services rendered, with interest from September 30, 1952 to July 22, 1955, said compensation to await the outcome of all litigation between the parties; and fixing the compensation of the Referee at $6,000.

And said appeals having been argued by Mr. Emil K. Ellis of counsel for the plaintiffs-appellants-respondents; by Mr. Simon H. Rifkind of counsel for the defendants-respondents-appellants, Central Zone Realty Corporation and Central Zone Realty, Inc.; and by Mr. Joseph Cohen,

referee-respondent pro se; and due deliberation having been had thereon; and the PER CURIAM opinion having been filed herein; it is unanimously

ORDERED that the said order so appealed from be and the same hereby is modified on the law and facts and in the discretion of this Court, by fixing the compensation payable to plaintiff for legal services in the amount of $5,000, with interest from July 22, 1955; and by eliminating the condition that payment of such compensation should await the outcome of all litigation between the parties; and it is further unanimously

ORDERED that the findings contained or incorporated in the opinion of the Court at Special Term, that:

> The reasonable value of the services rendered be fixed at $25,000 with interest from September 30, 1952 to July 22, 1955 (fol. 2850);
>
> Plaintiff, Max Eisenberg, acted in good faith in bringing these actions (fols. 2375-2376, 2850)

be and the same hereby are reversed; and this Court, in lieu thereof, hereby makes the findings and conclusions contained in the Per Curiam opinion filed herein; and it is further unanimously

ORDERED that the order appealed from, as so modified, be and the same hereby is affirmed, with costs of said appeals to the defendants-respondents-appellants, Central Zone Property Corporation and Central Zone Realty, Inc., payable by the plaintiff-appellant-respondent, Max Eisenberg

Enter

J. A. C.

Appendix A

Judgment of Court of Appeals Affirming Order of Appellate Division.

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS, in the Court of Appeals held at Court of Appeals Hall, in the City of Albany, on the 9th day of May, in the year of our Lord one thousand nine hundred and fifty-seven, before the Judges of said Court.

Witness, The HON. ALBERT CONWAY, Chief Judge Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur May 9, 1957

No. 315

MAX EISENBERG, on behalf of himself and all other stockholders of CENTRAL ZONE PROPERTY CORPORATION, similarly situated,

Appellants,

vs.

CENTRAL ZONE PROPERTY CORPORATION,

Respondent,

and

JOSEPH COHEN,

Referee-Respondent,

and

S. H. SCHEUER, & ors.,

Defendants.

(and another action)

BE IT REMEMBERED, that on the 24th day of October, in the year of our Lord one thousand nine hundred and

fifty-six, Max Eisenberg, on behalf of himself and all other stockholders of Central Zone Property Corporation, similarly situated, the appellants in these causes, came here unto the Court of Appeals, by Frank S. Samansky, their attorney—, and filed in said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Central Zone Property Corporation, the respondent, and Joseph Cohen, the referee-respondent in said causes, afterwards appeared in said Court of Appeals by Paul, Weiss, Rifkind, Wharton & Garrison, and Joseph Cohen, attorneys, the latter having appeared in person.

Which said Notice of Appeal and return thereto, filed as aforesaid, are hereunto annexed,

Whereupon, the said Court of Appeals having heard these causes argued by Mr. Emil K. Ellis, of counsel for the appellants, and by Mr. Simon H. Rifkind, of counsel for the respondents and submitted by the referee-respondent and after due deliberation had thereon did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed with costs, as aforesaid.

And hereupon, as well as the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices

thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office)
Albany, May 9, 1957)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said causes in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

Appendix A

Order of Court of Appeals Denying Rehearing.

STATE OF NEW YORK

In the Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the third day of July A. D. 1957.

Present, HON. ALBERT CONWAY, Chief Judge Presiding.

Mo. No. 251

MAX EISENBERG, on behalf of himself and all other stockholders of CENTRAL ZONE PROPERTY CORPORATION, similarly situated,

Appellants,

vs.

CENTRAL ZONE PROPERTY CORPORATION,

Respondent,

and

JOSEPH COHEN,

Referee-Respondent,

and

S. H. SCHEUER, & ors.,

Defendants.

(and another action)

A motion for a reargument of the above cause having been heretofore made upon the part of the appellants herein and papers having been duly submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

A copy

GEARON KIMBALL,
Deputy Clerk.

APPENDIX B

Conflicting Opinions.

TRUSTEES v. GREENOUGH, Reported in
105 U. S. 527, 26 L. ed 1157

Mr. Justice Bradley delivered the opinion of the court:

The question in this case is one of costs, expenses and allowances awarded to the complainant below out of a trust fund under the control of the court. Ordinarily, a decree will not be reviewed by this court on a question of costs, merely, in a suit in equity, although the court has entire control of the matter of costs, as well as the merits, when it has possession of the cause on appeal from the final decree. But it was held by *Lord* Cottenham, in the case of *Angell* v. *Davis*, 4 Myl. & C., 360, that when the case is not one of personal costs, in which the court has ordered one party to pay them, but a case in which the court has directed them to be paid out of a particular fund, an appeal lies on the part of those interested in the fund. *Lord* Cottenham, indeed, suggested other cases in which an appeal might lie from a decree for costs, as where the costs are part of the specific relief prayed; and where the whole of the facts distinctly appear upon the face of the proceedings themselves, so that it is not necessary, in determining the question, to enter into any investigation of the merits. But these suggestions have not met with subsequent approval; and in the case of *Taylor* v. *Dowlen*, L. R., 4 Ch. App. 697, the court declared that they were not disposed to extend the case of *Angell* v. *Davis;* and dismissed an appeal brought by parties ordered to pay costs, which they claimed should be payable out of a fund.

But these discussions in the English courts arose under a system in which appeals from interlocutory orders are allowed. We can only entertain an appeal from a final

decree, and supposing the objection to the appeal on the ground of its being from a decree for costs only is untenable, as we think it is, then arises another question, whether the orders appealed from amount to a final decree.

The principal suit was commenced in 1870 by a bill filed by Francis Vose, a large holder of bonds of the Florida Railroad Company, on behalf of himself and the other bondholders against Harrison Reed and others, Trustees of the Internal Improvement Fund of Florida, and against the former members of the same board, and against the board itself as a Corporation, and sundry other corporations alleged to be in complicity with them. The internal improvement fund consisted of ten or eleven millions of acres of land belonging to the State, including certain proceeds of sales of some of said lands, and was pledged for the payment of the interest accruing on said bonds and installments of a sinking fund, for meeting the principal, which were largely in arrear. The charge of the bill was to the effect that the Trustees were wasting and destroying the fund by making sales at nominal prices by the hundred thousand and even million of acres, and failed and refused to provide for the payment of interest or sinking fund on the bonds; and the bill prayed that the fraudulent conveyances might be set aside, that the Trustees might be enjoined from selling more lands, and that a receiver might be appointed to take care of the fund.

The litigation was carried on with great vigor and at much expense and, in fact, a large amount of the trust fund was secured and saved; the management of the fund was taken out of the hands of the Trustees; agents were appointed by the court to make sales of the land and made a large number of sales; a considerable amount of money was realized, and dividends have been made amongst the bondholders most of whom came in and took the benefit of the litigation. Vose, the complainant, bore the whole

burden of this litigation, and advanced most of the expenses which were necessary for the purpose of rendering it effective and successful. In 1875 he filed a petition, setting forth these advances and the efforts made by him, and prayed an allowance out of the fund for his expenses and services. In December, 1876, an order was made by the court referring it to a master to ascertain: 1. What and by whom the necessary expenditures have been incurred in bringing the moneys already received into court. 2. What necessary expenditures have been made and by whom, in protecting the landed and sinking fund from which this money has been and will be realized. 3. What personal services have been rendered and by whom, in said work, and the value thereof. 4. What amount of same have been charged to Francis Vose by the receiver, instead of being paid out of the common fund in his hands.

Vose presented his account and vouchers before the master, and testimony was taken on the subject. In 1877 the master made a report, in which, amongst other things, he stated as follows:

"First. After consideration of the proofs as submitted to me, I find and report that the moneys which have already been received, whether upon account of the Internal Improvement Fund or of the sinking fund, have been brought into court at the instance and the suit and by the sole efforts of Francis Vose, the petitioner, through himself, his solicitors and his agents, and by the instrumentality more directly and especially of his proceeding in equity against the Trustees of the Internal Improvement Fund *et al.*, as they appear in the records which are made evidence in this case."

The master further reported a statement of expenditures made by Vose, in the cause, and declared that they were necessary expenditures, being for fees of solicitors and counsel, costs of court, and sundry small incidental

items for copying records and the like, the whole amounting to $34,192.62. He also stated and allowed sundry fees paid in maintaining other suits in New York, and on appeal to this court, attorneys' fees for resisting fraudulent coupons, and expenses paid to attorneys and agents to investigate fraudulent grants of the trust lands, amounting in all to $19,745.68. He also reported in favor of an allowance to Vose for his personal services and expenditures, as follows:

"I further find and report that peculiar and great personal services have been rendered by the petitioner, Francis Vose, in the work of protecting the internal improvement and the sinking funds; those services extending over a period of more than eleven years. By the instrumentality of the suits already mentioned as having been instituted by him, by the agencies he employed and sustained, and by his own vigilance and personal efforts he has saved from spoliation and subjected to the decrees of this court a vast domain of over ten millions of acres of land; and has brought into this court large sums of money, which, from time to time, have been distributed by its orders.

I consider and report that the charge embraced in his itemized account, and numbered forty-two (42) for $25,000 principal, and $9,625 interest, is reasonable and just.

I also find that the charge in his itemized account, numbered forty-one (41) for personal expenditures of $15,003.35, is reasonable and just. Total $40,003.35."

The first of these items consisted of an allowance of $2,500 a year for ten years of personal services; the second was for railroad fares and hotel bills paid by the complainant.

The proceedings before the master were opposed; but, on a hearing upon the report and the evidence submitted therewith, the court confirmed it to the extent of $27,835.34, allowing generally the fees of the officers of the court, and those of the attorneys and solicitors employed in the cause, including charges as between attorney and client; at the same time disallowing certain fees paid to advisory counsel and other items not directly connected with the suit, and referring the remainder of the report for further evidence and hearing. In December, 1879, after additional evidence had been taken, a final order was made, allowing sundry expenses for looking after and reclaiming the trust lands, and also allowing for the personal expenses and services of Vose embraced in the two items before referred to; the total amount allowed being $60,131.96.

The appeal to this court is taken from these orders of the court below; and it is contended that they were illegal, because Vose was not before the court in the character of a trustee and, therefore, not entitled to re-imbursement of his expenses beyond taxable costs; and because the allowances were not lawful if he had been such trustee. The objections to the orders are not expressed in this precise form; but this is the substance of them.

The first question, however, is, whether these orders do or do not amount to a final decree, upon which an appeal lies to this court. They are, certainly, a final determination of the particular matter arising upon the complainant's petition for allowances, and direct the payment of money out of the fund in the hands of the receiver. Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision. The administration of the fund for the benefit of the bondholders may continue in the court for a long time to come, dividends being made from

time to time in payment of coupons still unsatisfied. The case is a peculiar one, it is true; but, under all the circumstances, we think that the proceeding may be regarded as so far independent as to make the decision substantially a final decree for the purposes of an appeal.

As to the point made by the appellants, that the complainant is only a creditor, seeking satisfaction of his debt, and cannot be regarded in the light of a trustee and, therefore, is not entitled to an allowance for any expenses or counsel fees beyond taxed costs as between party and party, a great deal may be said. In ordinary cases the position of the appellants may be correct. But, in a case like the present, where the bill was filed not only in behalf of the complainant himself, but in behalf of the other bondholders having an equal interest in the fund; and where the bill sought to rescue that fund from waste and destruction arising from the neglect and misconduct of the trustees, and to bring it into court for administration according to the purposes of the trust; and where all this has been done, and done at great expense and trouble on the part of the complainant; and the other bondholders have come in and participated in the benefits resulting from his proceedings; if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest. He may be said to have saved the fund for the *cestuis que trust*, and to have secured its proper application to their use. There is no doubt, from the evidence, that besides the bestowment of his time for years almost exclusively to the pursuit of this object, he has expended a large amount of money for which no allowance has been made, nor can properly be made. It would be very hard on him to turn him away without any allowance except the paltry sum which could be taxed under the fee bill. It would not only be unjust to him, but it would give to the other parties entitled to par-

ticipate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be re-imbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution. And such charge cannot be justly complained of by the Trustees of the Internal Improvement Fund, because, however fair may have been the conduct of the present Trustees, who were elected to their positions since the acts complained of were committed by their predecessors, those acts, as the event of the cause shows, furnished abundant ground for instituting the proceedings.

It is a general principle that a trust estate must bear the expenses of its administration. It is also established by sufficient authority, that where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to re-imbursement, either out of the fund itself, or by proportioned contribution from those who accept the benefit of his efforts. This has long been the rule in relation to proceedings for restoring property to the uses of a charity, which has been unjustly diverted therefrom. Thus, in *Atty-Gen.* v. *Brewers' Co.*, 1 P. Wms., 376, *Lord Chancellor* Cowper allowed costs to the relators out of the improved rents which they received for the charity, "For that they had been serviceable to the charity, by easing them of the six hundred and twenty pounds debt which was claimed against them. In *Atty-Gen.* v. *Kerr*, 4 Beav. 297, it is conceded to be the general rule that the relator in a charity information, upon obtaining a decree, is entitled to his costs as between solicitor and client. In that case they were not allowed out of the general charity estate, but were charged upon the particular property recovered.

The same rule was followed in *Atty-Gen.* v. *Old South Society*, 13 Allen, 474.

Of course, it is well understood that costs as between solicitor and client include all reasonable expenses and counsel fees, and are not like costs as between party and party, confined to the taxed costs allowed by the fee bill. This difference is pointed out in the case, *In re Paschal*, 10 Wall., 483, 493 [77 U. S. XIX., 992, 996].

The same rule is applied to creditors' suits, where a fund has been realized by the diligence of the plaintiff. In England, where specialty creditors have a preference, a simple contract creditor who recovers a fund for the general benefit, is allowed his costs, as between party and party, out of the fund in preference to all other claims; and the balance of his costs, as between solicitor and client, are to be paid either out of the fund or *pro rata* by all the creditors who partake of the benefit of the suit.

This was the judgment in *Stanton* v. *Hatfield*, 1 Keen, 358; followed in *Thompson* v. *Cooper*, 2 Coll., 87. In the latter case, *Vice-Chancellor* Knight Bruce said: "Having come in and proved, and obtained the benefit of the suit which was instituted on their behalf, as well as that of the plaintiff, it cannot be just that in such a suit—a suit instituted for the benefit of all the creditors—one alone should bear the burden, when others have the benefit." To the same purport, see, *Tootal* v. *Spicer*, 4 Sim., 510; *Larkins* v. *Parton*, 2 Myl. & K., 320; *Barker* v. *Wardle*, 2 Myl. & K., 818; and *Sutton* v. *Doggett*, 3 Beav. 9.

The rule that a party who recovers a fund for the common benefit of creditors, is entitled to have his costs and expenses paid out of the fund, prevails in bankruptcy cases. In *Worrall* v. *Harford*, 8 Ves., 4, *Lord* Eldon said: "The petitioning creditor is answerable till the assignment. Can there be a doubt that the assignees, if there be nothing special in the deed, would have a clear right to pay all the

expenses incurred? It would be implied if not expressed." This rule has been followed by the District Courts of the United States. See a forcible opinion of *Judge* Bryan, in *Re Williams*, 2 Bk. Reg., 28, in the District Court of South Carolina; and the case of *O'Hara*, 8 Am. L. Reg. (N. S.), 113, in the Western District of Pennsylvania. In a case in Massachusetts before *Judge* Lowell, the same rule was adopted. The petitioning creditors charged as an act of bankruptcy the execution of a mortgage by the debtors, and having succeeded, after much opposition, in substantiating the charge, they asked that counsel fees should be allowed them out of the estate. The remarks of *Judge* Lowell are so apposite, and seem to us so well considered, that we quote from his opinion. "A petition *in invitum*," says he, "to have a debtor adjudged bankrupt is for the benefit of all his unsecured creditors; and a favorable decree gives them all a proportionate advantage, and the court has no power to order, as is often done in chancery, that this advantage shall depend upon their contributing to the expenses of the suit; but any creditor may carry on the proceedings if the petitioner should refuse to do so; and after adjudication all may prove their debts. In this case, the fund from which the dividend will be paid is due entirely to the exertions of the petitioners in setting aside the mortgage; and, in most cases, though not in this, no single creditor nor any three or four of them have a sufficient interest to enable them to undertake the conduct of the proceedings without positive loss of money if they cannot tax the expenses on the fund, for those expenses will usually exceed the dividend on their debts. * * * The strong equities of the petitioner's case are not difficult to discover; and the practice under the Act of 1841 was to allow such a charge out of the assets, as I find by examining the records. My doubt was of my power in the premises under the fee bill of 26 February, 1853, 10 Stat. at L., 161, which does not

appear to sanction it and does appear to be intended to cover the whole ground of taxation of costs at law and in equity and admiralty; and by the general orders, these petitions follow the rule of cases in equity in all matters of costs. Upon reflection I have concluded that the fee bill is, probably, intended to reach only taxable costs, commonly so called, and may have its full effect without being construed to take away the power of a court of equity to permit counsel fees to be taxed in those cases where a fund is in court upon or to which different parties have distinct rights or claims. * * * I have been referred to the record of a case in equity in the circuit court in which *Judge* Sprague, since the passage of the fee bill, ordered the counsel fees of all parties to be paid out of the fund; and *Judge* Kane adopted a like rule in *Ex parte Plitt*, 2 Wall., Jr., 453. These decisions and those in bankruptcy already cited, justify me in construing the statute in the way which the equities of the case so clearly demand."

The views here expressed with regard to the application of the fee bill to cases of this sort are, undoubtedly, correct. The fee bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client, nor the power of a court of equity, in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require. The fee bill itself expressly provides that it shall not be construed to prohibit attorneys, solicitors and proctors from charging to and receiving from their clients (other than the government) such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties. Act of 1853, sec. 1, 10 Stat. at L., 161; R. S., sec. 823. And the Act contains nothing which can be fairly construed to deprive the court of chancery

of its long established control over the costs and charges of the litigation, to be exercised as equity and justice may require, including proper allowances to those who have instituted proceedings for the benefit of a general fund.

This court in the case of *Cowdrey* v. *R. R. Co.*, 93 U. S. 352[XXIII, 950] sustained an allowance of $5,000 for counsel fees to be paid to counsel out of the proceeds of a railroad mortgage, foreclosed in the Circuit Court for the District of Texas, being the amount agreed by the trustees to be paid for instituting proceedings which were discontinued by the intervention of the civil war. A new bill was afterwards filed by some of the bondholders, and the fund was brought into court, and the fee in question was directed to be paid by the receiver. We regarded the charge as a proper one to be paid out of the fund. Liberal allowances were also made by the circuit court in the same case for counsel fees and other charges incurred by the complainants in the cause, which were never brought to this court for review.

In the vast amount of litigation which has arisen in this country upon railroad mortgages, where various parties have intervened for the protection of their rights, and the fund has been subjected to the control of the court and placed in the hands of receivers or trustees, it has been the common practice, as well in the courts of the United States as in those of the States, to make fair and just allowances for expenses and counsel fees to the trustees, or other parties, promoting the litigation and securing the due application of the property to the trusts and charges to which it was subject. Sometimes, no doubt, these allowances have been excessive and perhaps illegal; and we would be very far from expressing our approval of such large allowances to trustees, receivers and counsel as have sometimes been made, and which have justly excited severe criticism.

Still, a just respect for the eminent judges under whose direction many of these cases have been administered, would

lead to the conclusion that allowances of this kind, if made with moderation, and a jealous regard to the rights of those who are interested in the fund, are not only admissible, but agreeable to the principles of equity and justice.

The subject of allowances to be made to trustees *eo nomine* is very fully examined in the books. An exhaustive citation of both English and American authorities is to be found in the *notes* to the case of *Robinson* v. *Pett*, 2 White & T., L. Cas. Eq., 238, Am. ed., pp. 512-600; and see, Perry, Trusts, secs. 894, 910, 912.

It is unnecessary, however, to pursue the subject further. The conclusion to which we have come is that, under the circumstances of this case, the circuit court had the power, in its discretion, to allow to the complainant, Vose, his reasonable costs, counsel fees, charges and expenses incurred in the fair prosecution of the suit, and in reclaiming and rescuing the trust fund and causing it to be subjected to the purposes of the trust. The allowances made for these purposes we have examined and do not find anything therein seriously objectionable. The court below should have considerable latitude of discretion on the subject, since it has far better means of knowing what is just and reasonable than an appellate court can have. It is not shown in this case, by the appellants, that any of these allowances are excessive, or that the expenditures allowed were not fairly and honestly made.

But there is one class of allowances made by the court which we consider decidedly objectionable. We refer to those made for the personal services and private expenses of the complainant. In England and some of the States, no such allowance is made even to trustees *eo nomine*. In other States it is. But the complainant was not a trustee. He was a creditor, suing on behalf of himself and other creditors, for his and their own benefit and advantage. The reasons which apply to his expenditures, incurred in carrying on the suit and reclaiming the property subject to

the trust, do not apply to his personal services and private expenses. We can find no authority whatever for any such charge by a person in his situation. Where an allowance is made to trustees for their personal services, it is made with a view to secure greater activity and diligence in the performance of the trust, and to induce persons of reliable character and business capacity to accept the office of trustee. These considerations have no application to the case of a creditor seeking his rights in a judicial proceeding. It would present to great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount, if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid. Such an allowance has neither reason nor authority for its support.

We are of opinion, therefore, that the allowance for these purposes was illegally made, *and that to this extent the orders should be reversed.* We refer to the allowance in the last order, of $15,003.35 for private expenses, and of $34,625 for personal services. As to those items, *the said last order will be reversed and, in all other respects, both of the orders appealed from will be affirmed.*

Mr. Justice MILLER, dissenting:

While I agree to the decree of the court in this case, I do not agree to the opinion, so far as it is an argument in favor of a principle on which is founded the grossest judicial abuse of the present day, namely; the absorption of a property or a fund which comes into the control of a court, by making allowances for attorneys' fees and other expenses, pending the litigation, payable out of the common fund, when it may be finally decided that the party who employed the attorney or incurred the costs, never had any interest in the property or fund in litigation.

This system of paying out of a man's property some one else engaged in the effort to wrest that property from him, can never receive my approval; and as I have had no opportunity to examine the authorities cited in the opinion, I can do no more than make my protest against the doctrine.

True copy. Test:

James H. McKenney, Clerk, Sup. Court, U. S.

Cited—109 U. S., 155; 111 U. S., 699; 113 U. S., 122, 124, 126.

ROGERS v. HILL Reported in 34 F. Supp. 358
(S.D.N.Y. 1940)

LEIBELL, District Judge.

Seven applicants seek leave to intervene in this action, as parties plaintiff, and as part of their prayer for relief ask that the court set aside a decree of this court dated July 13, 1933, which vacated an injunction pendente lite and dismissed this action without costs. The applicants all allege that they are stockholders of the defendant, The American Tobacco Company, and that they should be admitted as parties plaintiff on the ground that the action was dismissed as a result of a fraud on the court, to which the plaintiff Rogers, also a stockholder, is alleged to have been a party. For reasons hereinafter stated, I have concluded that no fraud has been shown, that the decree of dismissal dated July 13, 1933, should not be vacated, and that the petitions for permission to intervene in this action should be denied.

The dates of the petitions for leave to intervene are as follows:

Appendix B

Abraham M. Forman	— August 14, 1939
Esther Heller	— August 18, 1939
Tille S. Wile	— September 29, 1939
William Frisch	— September 29, 1939
Ruth J. Yaeger	— October 11, 1939
Minnie Mandelker	— November 28, 1939
William Cohn	— December 13, 1939

Paragraphs 3 and 4 of the Cohn petition and all of his bill of intervention are the same as certain paragraphs of the Wile petition and all the Wile bill of intervention. Apparently Cohn's lawyer copied the Wile papers. The Mandelker petition is based on the Frisch petition, which it either paraphrases or copies ad lib. Mandelker's lawyers must have used the Frisch papers. The Cohn and Mandelker petitions will not be discussed further. This form of plagiarism should be condemned. The Wile petition and bill of intervention are the same as those of Forman. But Wile's attorney states in his brief that this was by arrangement with the lawyer for Forman. These petitioners should have joined in the one petition, or else Wile should have been content with the Forman and Heller petitions already on file. Wile's lawyer states that he did not know of the filing of Heller's petition. The Heller and Frisch petitions have no proposed bill of intervention annexed; the Forman and Yaeger petitions have.

[1] If the so-called bill of intervention is a pleading which sets forth the claim for which intervention is sought it would meet the requirements of Rule 24(c) of F.R.C.P., 28 U.S.C.A. following section 723c. But it is doubtful that Rule 24, relating to intervention, applies to this litigation, since the litigation was not pending when the Federal Rules of Civil Procedure went into effect, September 16, 1938. (See Rule 86). McCrone v. United States, 307 U. S. 61, 65, 59 S.Ct. 685, 83 L.Ed. 1108; Hill v. Ohio Casualty Ins. Co., 6 Cir., 104 F.2d 695, 696.

[2] I think that former Equity Rule 37, 28 U.S.C.A. following section 723, applies. It has been held that said rule was merely declaratory of the established equity practice relating to intervention. Rule 24 F.R.C.P., specifically permits intervention where a plaintiff's representation is inadequate for the protection of the applicant's interests, and it is asserted that Rogers' alleged collusion with the defendant directors makes his representation inadequate. But under Equity Rule 37 intervention may be granted for that reason too, although it is not specified in the rule; and at any time "when it is necessary to do so to preserve some right which cannot otherwise be protected", intervention may be granted. United States Casualty Co. v. Taylor, 4 Cir., 64 F.2d 521, 527. The main question here presented is the right to intervene. Whittaker v. Brictson Mfg. Co., 8 Cir., 43 F.2d 485, 490; Ayer v. Kemper, 2 Cir., 48 F.2d 11, 13. If for reasons hereinafter stated the right to intervene should be denied, there is no need of discussing what procedure petitioners should follow or what other relief they might be entitled to if they were given the status of intervenors.

Forman's notice of motion prays for an order:—

"(a) granting leave to the petitioner herein to intervene as a party plaintiff in the above entitled cause and for leave to file a bill of intervention in the form annexed hereto;

"(b) vacating and setting aside the said order of this Court dated July 13, 1933;

"(c) reinstating the said order of this Court dated March 24, 1932;

"(d) that the control and charge of the above entitled cause be vested in the petitioner herein;

"(e) setting aside a settlement agreement dated July 12, 1933, entered into between George W. Hill, Charles F.

Neiley, Vincent Riggio, Thomas R. Taylor, Paul M. Hahn and the American Tobacco Company;

"(f) that the above entitled cause be set down for trial for a day certain to be fixed by this Court;

"(g) and for such other and further relief as to the Court may seem just and proper, upon the ground that the said agreement, dated July 12, 1933 was entered into, and a resolution of the Board of Directors of the same date was adopted, upon considerations not appearing in the record of this Court, but solely for the illegal and improper purposes more fully set forth in the supporting papers, and on the ground that the said order of this Court, dated July 13, 1933 was made and entered in contemplation of said resolution and agreement, and upon the consideration therein expressed, and also upon the considerations recited in the said order, and upon no other considerations, and on the further ground that the representation of the petitioner's interest in the above entitled cause is inadequate."

The alleged fraudulent conduct of Rogers, as set forth in the supporting papers, is that he received from The American Tobacco Company a net fee of $263,000, plus the payment of his income tax thereon ($262,000) for his services in this and the other litigations which as a stockholder he had instituted against the individual defendants, directors of the defendant, The American Tobacco Company. This bonus action and two other suits attacking certain stock allotments and credits to the individual defendants, were settled on the same date, July 13, 1933, as one general settlement. It is charged that the three courts in which these actions were pending were not told the amount of Roger's fee and that this was a fraud on the courts. Petitioner Forman also alleges that Chadbourne, Stanchfield & Levy received a fee of $320,000 in these matters, of which only $96,000 was paid by the individual defendants, the balance being paid by the corporation, and that this fact was not

disclosed to any court. Assuming this to be so, Rogers knew nothing of it. The propriety of the fee to Chadbourne, Stanchfield & Levy will be later discussed. The charge against Rogers is made more bluntly by some of the petitioners—that the Rogers' settlement of his various litigations against the directors of The American Tobacco Company was induced by the payment to him of an excessive fee, for which he is alleged to have sold out the real interests of the stockholders. At least one of the petitions calls the Rogers' fee a bribe.

[3] I have carefully examined all the affidavits and papers filed by the petitioners and have read the deposition of Rogers and the affidavits of others submitted in opposition. In my opinion Rogers completely refutes the charge that he settled his litigations against The American Tobacco Company directors because of any improper motives. Further, the record shows that he earned the fee he received and that through his services in the litigations he conducted in various stages through the appellate courts, he obtained for the defendant, The American Tobacco Company, benefits which at the time of the settlement had an actual value of $6,200,000 and since then have resulted in a further saving of about $2,250,000.[1] Addi-

[1] I figure the $6,200,000 as follows:—Hill suit, New York Supreme Court, cash returned $960,000, plus a saving of $35.00 a share on 90,800 shares returned $3,178,000—total in the State Court action $4,183,000. In the 1930 employees stock subscription plan suit, eventually disposed of in New Jersey, 27,500 shares were returned on which the corporation saved $75.00 a share, or $2,062,500. (There is a further possible saving on the 283,556 shares not issued under the 1930 plan at the time the suit was settled which may be issued pursuant to the terms of settlement only at a price that will take into consideration the market value). In the bonus action in this court the new basis for calculating the bonus, as fixed by the terms of settlement, has since resulted in a saving of $2,262,000 and there should be an annual saving of about $429,000 at a conservative estimate, for future years.

tional savings to the corporation on future bonuses and on the 1930 employees' stock subscription plan will amount to many more millions.

[4] The fee Rogers received was a reasonable fee. It was less than 8½ percent of the $6,200,000 of the actual and concrete saving obtained through restitution by the directors of credits and stock previously received. The May, 1939, issue of the Columbia Law Review contains an article in which are listed, at page 814, the fees paid to lawyers who, in recent years, have brought derivative suits for stockholder clients against corporate directors requiring them to account for acts of malfeasance and misfeasance. Percentages recently awarded have ranged between 20 percent and 33⅓ percent of the benefit obtained for the corporation. When Rogers' fee and the results he obtained are compared with the cases listed in the law review article, he appears to have been paid a very reasonable fee.

[5] The elements to be considered in determining an attorney's fee are stated by Judge Woolsey in Re Osofsky, D.C., 50 F.2d 925, 927, based on a summary of testimony given by William G. Choate and David B. Ogden on a reference many years ago—"They laid down the following elements as being matters properly to be considered when the fees of an attorney have not been agreed on beforehand, but are to be fixed: (1) The time which has fairly and properly to be used in dealing with the case; because this represents the amount of work necessary. (2) The quality of skill which the situation facing the attorney demanded. (3) The skill employed in meeting that situation. (4) The amount involved; because that determines the risk of the client and the commensurate responsibility of the lawyer. (5) The result of the case, because that determines the real benefit to the client. (6) The eminence of the lawyer at the bar, or in the specialty in which he may be practicing."

Appendix B

The circumstances under which Rogers instituted the stockholders actions in this court, in the New York Supreme Court and in the Chancery Court in New Jersey, are set forth in his affidavit, sworn to October 31, 1939, and filed in opposition to the Forman application to intervene herein. His affidavit also sets forth a complete summary of the various steps in these litigations, the legal services rendered during a period of 2½ years in state, federal and appellate courts; the settlement arrived at and the benefits obtained for The American Tobacco Company as a result of the settlement. The importance and the extent of his legal services cannot be questioned.

[6] Rogers and his family had a very substantial interest in The American Tobacco Company; 6200 shares were owned by them as compared with the total of 520 shares owned by the seven petitioning intervenors. Every stockholder, no matter how small his holdings, has the right to be heard and through litigation may compel directors to account for their misdeeds. But when we come to weighing charges of fraud and bribery, against a stockholder who alone carried the burden of almost three years of litigation, the substantial interest of this litigating stockholder is not to be ignored. Any one who reads carefully the Roger's affidavit of the legal services he performed in these litigations must be impressed with the amount of time he gave to these suits and the skill he displayed in successfully opposing the best legal talent the defendants could hire. The amount involved in these suits was large and the results Rogers obtained were of very substantial benefit to the corporation.

Rogers did not go into this litigation in order to develop some law work for himself. As a stockholder of The American Tobacco Company he received a notice in the summer of 1930 that a special meeting of stockholders would be held to pass upon a proposed employees' stock subscription plan in which the directors, as employees,

were to be eligible to participate. Rogers had a representative attend the meeting and give notice on his behalf that if the stock was sold under the plan at less than the market price, he would attempt to hold the directors responsible in court. About six months later he read in the newspapers that the corporation was selling stock to the employees and officers at $25 a share although the market price was $112 a share. He wrote the corporation and asked that it take legal proceedings to enjoin the fulfillment of this declared purpose. He received no response, so he prepared a draft of a complaint in an action against the directors in the Supreme Court, New York County. The corporation refused him any information and he was obliged to get a mandamus to obtain access to the corporation's books wherein he found the record of other payments and credits to the directors which led to the institution of other stockholders' actions by him.

Rogers appeared "in sua persona" and acted as his own attorney, except as a matter of record in the New Jersey court in which he was not admitted to practice. Prior to these litigations he had attained real eminence at the bar and was considered a reputable and able attorney. President Theodore Roosevelt had appointed him general counsel of the Isthmian Canal Commission. He became head of the Department of Law and Administration of the Canal Zone. He was a director of the Panama Railroad and at one time its general counsel. Later he was the general counsel of the Interborough Railroad in New York City, for about eleven years. In these stockholders' litigations against The American Tobacco Company directors he prepared all his own legal papers, wrote his own briefs and argued the motions and appeals in all courts. Indeed, on the argument of the present applications for leave to intervene, the attorneys for the applicants were pretty much in agreement that the amount of the fee Rogers received on the settlement of his lawsuits was reasonable.

But the applicants urge that, even assuming the fee to be reasonable, Rogers concealed from the courts the fact that he was receiving a fee. We must first consider, in weighing that charge, whether there was any duty imposed on Rogers to state to the courts in which his stockholders' suits were being settled the fact that he was getting a fee and the amount thereof. Any judge passing on a settlement of any of the Rogers' suits would naturally assume that Rogers was receiving a fee and that the American Tobacco Company was paying it, in view of the fact that Rogers had conducted these litigations for almost three years and was concluding a very satisfactory settlement, the terms of which were set forth before all of the courts in which the pending litigation was settled. In the Chancery Court in New Jersey, after a hearing on notice, it was found that the complainant stockholders (of whom Rogers was one and Matthews, a late starter, was the other) had "agreed to a fair and just basis for the final settlement and disposition of all issues" in that litigation which involved the so-called 1930 employees' stock allotment plan. The terms on which all the lawsuits were being settled were explained to Judge Sheintag in the New York Supreme Court action, in which the 1929 and other stock allotment plans were involved, on some of which restitution had been made by the defendants after they had filed their answer. Likewise before Judge Caffey in this court the disposition being made of all the lawsuits and the terms of the general settlement were fully explained. On July 12th, 1933, it was understood that Judge Caffey would dismiss the bonus suit in this court on the terms set forth in the proposed decree of dismissal, if the chancellor in New Jersey approved the terms of the settlement of the issues in that court.

[7] We must not lose sight of the fact that the settlement in July, 1933, was a general settlement, that it con-

templated the disposition of all the pending stockholders' suits and that the fee Rogers received covered his services in all of these suits. The fact that it was a general settlement has a bearing also on the adequacy of the settlement of the bonus action in this court. Some of the counsel for the present applicants argue that the court on these present applications cannot consider all that Rogers recovered for the corporation in all his lawsuits, but only the benefits the corporation received from the settlement of bonus litigation in this court, in determining whether Rogers made a proper settlement of the bonus litigation. I do not agree with this contention. These applicants claim that Rogers failed to get a fair settlement of this bonus action and that he so failed because he was paid a large fee, which admittedly he had earned on the whole general settlement.

[8] It is not uncommon for a litigant who has several causes of action against a defendant to receive, on a general settlement, an amount or a consideration for one of his causes of action which in and of itself, without considering what he received on his other suits, might seem insufficient. We must look to the terms of the general settlement in order to form a fair and just opinion. But even if we disregard the benefits the corporation received in the settlement of the New Jersey Chancery suit and in the New York Supreme Court suits and consider only what was accomplished in the settlement of this bonus suit, I cannot say that the terms of settlement of the bonus action were so improvident as to suggest fraud. While no refund was obtained of bonuses already paid, which allegedly were in great part illegal (the total amount involved was about $10,000,000), there was an adjustment of the base on which the bonuses were to be calculated in the future, which resulted in a saving of about $430,000 a year. The United States Supreme Court had held that the 1912 by-law, under which the bonuses had been paid,

was not in itself invalid, and had referred the case back to the District Court to "determine whether and to what extent payments to the individual defendants under the by-laws constitute misuse and waste of the money of the corporation". Rogers v. Hill, 289 U.S. 582, at page 592, 53 S.Ct. 731, 735, 77 L.Ed. 1385, 88 A.L.R. 744.

Rogers was examined before trial on November 29, 1939, in a suit instituted by several of these present applicants in the Supreme Court, New York County, against the defendant directors, Rogers and others, to recover, among other things, the fee paid to Rogers in July, 1933, on the settlement of his stockholders' suits. In the course of that examination he was asked why he had made the settlement of the bonus action without recovering any part of the bonuses which had been paid from 1921 to 1930. His explanation was as follows:

"Then we came down to the question of the bonus suit. Well, naturally, I raised the question of whether these individual defendants who received these bonuses would contribute, would pay back, any money, and they took a very powerful position on that and stated that they weren't in a situation to pay any substantial sums of money, they had been bothered with income taxes, and I don't know what other arguments were put up.

"I realized myself that if we went on and fought this question as to whether these payments could be justified or not, they could assemble an infinite amount of testimony on the subject, and the trial of the thing would last through maybe a series of years and it would result perhaps in uncollectible judgments against them, that is the way it appeared to me. So there was a counter-proposition made, that instead of that, that they would be willing to reduce the amount of the bonuses that they received under this by-law which the Supreme Court had sustained as valid, and that is the formula which everybody is familiar with

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"There was another important consideration which impressed me at the time and which I thought I was bound to take advantage of. There was a by-law sustained by the Supreme Court of the United States, and it had to be accepted. I had brought an action predicated upon the bonus and salary payments made to the officers and directors of the Company for certain years prior to the year in which I instituted the suit, but I recognized at once that that didn't dispose, even if I prosecuted that thing on to a judgment and got a favorable judgment, of the question as to what salaries the officers would be entitled to receive in every succeeding year."

* * * * *

"I couldn't imagine that if I had carried on a litigation with these officers for years over that question of their compensation and where they would be confronted with the possibility of a large judgment against them which they could not meet, it would not certainly upset the management of the company. I thought it would, and I have tried to make it plain. If you will look in my brief in the Supreme Court of the United States you will find that statement made, that I was not finding any fault with the actual commercial operations of the company or the management of it in that respect, which I thought had been efficient. I never took any other position about it. When I was asked about the status of the litigation I then made the observation that I thought if it could be settled on terms that were fair and just to the company, it would be for the interest of the company to settle the suit and to get the matter out of the courts."

* * * * *

"Their argument related more to the fact that these gentlemen weren't in any situation, if I got a very large recovery against them as a result of a prolonged litigation, to meet any very enormous judgment, and then I realized

that if they were telling me the truth, which I suppose they were, I could not disprove it, and that would have the effect of unsettling the management, and that would be disadvantageous to the general operation of the company."

Rogers was not complaining of the commercial operations of the corporation under the management of its officers and directors. He complained of their greed in compensating themselves excessively for what they had done well.

The terms of settlement of all the Rogers stockholders' suits in July, 1933, were only published at the time. They were also reported at the next meeting of stockholders and approved. Nothing was said about any attorneys' fees, but surely no one expected that all of Rogers' services were rendered gratis. If Rogers had received a grossly excessive fee, there might be some basis for arguing that the fee was made excessive in order to influence his judgment in settling the lawsuits. But his fee was moderate and undoubtedly these present applications would never have been made if it were not for certain facts developed in the trial of the Manton case and in the Levy disbarment proceeding. But none of those facts reflect on the honesty of Rogers. Counsel for the applicants herein admitted on the argument that the corruption testified to in the Manton case in no way tinged the final settlement herein. What Levy may have cabled Hill as Levy's opinion of Rogers—he termed Rogers "a high class hold-up artist"—is no reflection on Rogers who stood out against all their efforts to buy him off, to tire him out, or to frustrate him altogether by their interminable legal maneuvers. There is no logic in the argument that because Manton was convicted and Levy was disbarred it follows that Rogers, who persevered with his stockholders' suits to a successful settlement, was also corrupt. He was the intended victim of all the alleged intrigue. Although on three separate occasions

Rogers received offers from the defendants to buy the 6,200 shares of stock he and his wife owned (title to which was in a holding company) he rejected these offers, and when negotiations for a settlement were under way he refused even to discuss the question of the amount of his fee until all the terms of settlement of his stockholders' suits had been agreed upon.

[9] The present applicants and their attorneys know that unless they can show some fraud on the part of Rogers, there is no basis for their plea that this bonus action should be reopened, the decree of dismissal entered on the settlement herein vacated and the petitioners permitted to carry on the litigation in place of Rogers. So these applicants contend that there must have been something sinister in back of the settlement because Rogers' fee was not disclosed to any of the judges, and a point is made that it was paid by bank cashier checks. There is nothing unusual in using a bank's checks in a settlement. The lawyers for the plaintiff in the Matthews suit in New Jersey also received the same kind of checks. Every one of the judges who had any part in consummating the settlement must have assumed that Rogers would be paid for his legal services and by the corporation of course. Meighan v. American Grass Twine Co., 2 Cir., 154 F. 346. If the directors, the individual defendants, had paid Rogers a fee there would be reason to suspect Rogers. The directors were not obligated to pay his fee; the corporation was and the corporation paid it. Meighan v. American Grass Twine Co., supra. The directors who were being sued took no part in the approval of Rogers' fee at the meeting of directors at which the fee was approved.

[10] There is nothing in the record to indicate that in the course of the thorough hearing on the settlement before Chancellor Fallon in New Jersey any question was

raised as to the fee Rogers was to receive. Evidently Judge Shientag did not go into it when the terms of the general settlement were explained to him at the time he was asked to sign an order dismissing the New York Supreme Court action. Judge Caffey did ask Rogers if he wanted the judge to fix a fee for Rogers' legal services, and Rogers replied that it was not necessary, that that had been arranged. If it were necessary that the court fix the fee, it is reasonable to assume that some one of the three judges would have required that this be done before he signed the order or decree submitted on the settlement. Counsel have been unable to cite a case which holds that under the practice prevailing in 1933 it was necessary that the court fix the attorneys' fee on the settlement of a stockholder's derivative and representative action. In some cases that was done but there was no rule or practice which prevented the corporation and the attorney for the stockholder from arriving at a figure as a reasonable fee for his services. I think that the better practice was and is to have the court fix the fee. But if that were an essential requirement on the settlement of a stockholder's suit in 1933, would three distinguished judges, in as many different courts, overlook it? We did not then have the practice that now prevails under Rule 23(c) requiring notice to stockholders on the settlement or dismissal of a shareholder's derivative action.

Rogers has explained that since this was a general settlement, involving suits in three different courts, no one court could fix the fee for his services in the litigations in the other two courts. Further, the services and the results obtained had to be viewed as a whole. If the amount Rogers received was fair and reasonable, what difference would it make if it resulted from a private arrangement or was fixed piece-meal by the three courts after a hearing. We have the right to assume that a just judge would

make a fair allowance, having in mind the essential elements to be considered in fixing that allowance.

The petitioners who now seek to intervene, and who were stockholders at the time Rogers was carrying on these litigations single handed, never offered to intervene at that time or to help defray the expenses of the litigation. They knew the terms of the settlement and as stockholders they were substantially benefited thereby. Now they seek, in other lawsuits, to recover from Rogers the reasonable fee he received and they ask to reopen this lawsuit to see if they can recover some part of the 1921-1930 bonuses.

[11] Although Forman in paragraph (e) of his notice of motion sought as part of his relief that the court enter an order "setting aside a settlement agreement dated July 12, 1933, entered into between George W. Hill, Charles F. Neiley, Vincent Riggio, Thomas R. Taylor, Paul M. Hahn and the American Tobacco Company", his attorney on the argument and in his brief now withdraws that part of his prayer on the ground that there was no settlement in July, 1933. The resolution adopted by the Board of Directors on July 12, 1933, and the agreement signed by the directors with the corporation on the same day made the readjustment of future bonuses under Article XII of the by-laws and the adoption of a new policy in respect to the 1930 stock allotment plan, conditional upon the settlement of the New Jersey and the New York Supreme Court actions, involving stock allotments, and the settlement of the bonus action in this court. I don't see how the benefits of the settlement could be retained under two of the lawsuits and in effect set aside as to one, by reopening this bonus action. Certified copies of the agreement of settlement between the directors and the corporation, and of the resolution of the Board of Directors, both dated July 12, 1933, were before Judge Caffey when he was considering the proposed decree of dismissal herein and they were filed with the clerk of this court together with the decree.

[12] A further argument advanced by petitioners to show that a fraud was perpetrated upon the court is based upon a recital in the decree of dismissal signed by Judge Caffey July 13, 1933, as follows: "Whereas, plaintiff individually and as a stockholder, and acting in the interest and on behalf of the stockholders generally of The American Tobacco Company, believes it to be to the best interests of The American Tobacco Company and its stockholders to terminate this litigation upon the considerations hereinafter set forth; and no other person having intervened or sought to intervene herein;" Petitioners argue that Rogers' fee as an attorney was not set forth in the order, that it was a consideration for the termination of the litigation, and therefore that the order submitted contained a false recital. The order did recite correctly the "terms" of settlement. The word "considerations" means just that, as the whereas clause immediately following indicates, to wit: "Whereas, the parties hereto have duly agreed on said terms and accordingly have stipulated:—" Then follow eight paragraphs relating to the readjustment of bonuses for the future, and two paragraphs relating to the cancellation of directors' subscriptions of 27,500 shares of Common Stock B referred to in paragraph 8 of the amended complaint and the cancellation of certain credits to the directors described in paragraph 7 of the amended complaint in the action in this court. The "consideration" and the "terms" of settlement mentioned in Judge Caffey's decree of July 13, 1933, related to the settlement of the claims asserted by the stockholder Rogers against the defendant directors because of certain acts of malfeasance or misfeasance of the directors alleged in the amended complaint. The same thought was put more precisely in part of the preamble to the July 13, 1933, decree of the chancellor in the New Jersey action, by using the expression—"that said issues are concluded on the terms hereinafter set forth".

Appendix B

The fee, and the terms of settlement of the issues involved in the litigation, were something separate and distinct. Rogers has testified that in the negotiations leading up to the settlement he refused to discuss the amount of his fee until the terms of the settlement were agreed upon. He dictated a memorandum of the terms after they were agreed to and before any arrangement was made as to his fee. That memorandum appears at pages 51 to 55 of Rogers' deposition taken November 29, 1939. One of the concluding paragraphs of the memorandum is as follows: "The question of fees is to be left open to immediate adjustment, and it is understood that the terms of this settlement are contingent upon the agreement with respect to the amount of the fees, which, if not agreed upon, will permit either party to withdraw."

Into that paragraph petitioners also read a fraudulent intent upon the part of Rogers. They argue that he reserved the right to toss the settlement aside, regardless of its benefit to the corporation, unless his demands as to fees were met. But the reservation could be used by the defendants also as a basis for refusing to go through with the settlement, unless Rogers agreed in advance to a proper fee. If the amount of his fee were not agreed upon, "either party" could withdraw from the settlement. It may be that the attorneys for the corporation feared that on the settlement such as had been outlined, Rogers might have sought from the court a fee of 25% of the value of the recovery and the benefits he was obtaining for the corporation and in that event Rogers' fee might have been several times the amount the corporation finally paid. There is no basis for assuming that the defendant corporation, its officers, directors and their attorneys wished to be generous to Rogers. After all the defendants had done, jointly or severally, openly or surreptitiously, to frustrate him for three years, he was at last and single-

handed bringing them to book. They liked him so little that even then, with a settlement agreed upon, they wanted to be rid of him altogether, so they offered to buy his 6,200 shares of stock instead of paying him a fee.

Rogers in his deposition (December 1, 1939) describes his conference on the fee as follows: "I went in there when the question of fees came up, and I think I stated to him that a friend of mine had suggested to me something like a million dollars, but I didn't want to take it up on that basis. What I wanted was a net fee which would provide for my income tax. I did not want that hanging over my head for two or three years, or, if I should happen to drop off, over my family. I wanted a lesser fee fixed which would provide for the income tax. Then Mr. Whiteside, as I recall, took up again some question about buying the stock, and I told him that was not only impractical, but that I would not consent to it. I pointed out that if I could carry through a settlement on any such basis, it would result, since some of that stock was in a personal holding company of mine, in a double taxation. He finally said he understood that, and he abandoned all suggestion of any settlement on that basis, and he made some figures along that line, it seems to me—I am not certain about that. Then I thought I ought to have a net fee somewhere along about $300,000, and he made some figures. However, he would have to testify to that. I thought it was in connection with the abortive talk about the stock deal, but he had that figure of $263,000. I said, 'Oh, well, let it go at that, provided the income tax is covered,' and that was all about that. And then the subsequent conversations had no connection with the fee. * * *."

In the early stages of the Rogers' litigations, and also after the argument but before the decision of the bonus appeal by the United States Supreme Court, the defendants had twice offered to buy Rogers' stock. He refused each

time. He also refused a third offer to that effect, as shown above. All this serves to undermine the basis for any charges of fraud against Rogers. But the petitioners see evil in Rogers' reference to his personal holding company and the possibility of double taxation if he sold his stock, although they made no point of it while cross-examining him. The petitioners argue that the real reason Rogers refused the offers to buy his stock was the fear of double taxation, not because he was adhering to ethical standards that he felt bound to maintain as a reputable member of the bar. He testified he "would not consent" to the suggestion that he sell his stock. It may have been impractical also, but that was secondary. He had rejected the second offer to buy his stock with the rejoinder "That is out of the question, and I have always objected to that." The first time he was approached with an offer to buy his stock after the decision of the New York Court of Appeals allowing an examination of the corporation's books, he had told the intermediary:—"I can't do it. I can't sell the stock. I can make no settlement of this suit except on the basis of a court decree where the benefits of the recovery go directly to the American Tobacco Company." He never departed from that purpose.

[13] Petitioners urge that if the decree of dismissal herein is not vacated and this action reopened, they will be unable to attack the bonuses paid between 1921 and 1930, because of the statute of limitations. Cwerdinski v. Bent, 256 App. Div. 612, 11 N.Y.S.2d 208, affirmed 281 N.Y. 782, 24 N.E.2d 475. They state that in certain suits in the New York Supreme Court which they instituted in 1939 and which have been consolidated, wherein they attack all bonuses paid under Article 12 of the by-laws, including the 1921-1930 period, the defendant directors have in that litigation pleaded the statute of limitations. Peti-

tioners wish to reopen this action to avoid the statute and with that purpose in mind petitioners urge that the Rogers settlement of this action was both fraudulent and improvident. I have concluded that there was no fraud in the settlement. As to its alleged improvidence, I do not believe that alone would provide the basis for the relief petitioners seek. If petitioners were stockholders at the time of the settlement they must have heard of the terms of settlement which were widely publicized. If they were not satisfied with those terms, they should have raised the issue at that time either at the stockholders' meeting which approved the terms, or by appropriate court action on their own part. If they were not stockholders at the time of the transaction of which they complain, then Rule 23(b) of the Federal Rules of Civil Procedure, and former Equity Rule 27 and the doctrine of Hawes v. Oakland, 104 U.S. 450, 26 L.Ed. 827, must be reckoned with, especially if the period involved is also barred by the state statute of limitations. The delay herein on petitioners' part in taking action to attack the settlement of the bonus action on the ground that it was improvident, would constitute laches.

[14] The argument is also advanced that the decree of dismissal should be vacated because the corporation should have had, at the time the terms of settlement were being discussed, an attorney, other than the law firm that was also acting for the director defendants. If the corporation itself were dealing with the director defendants and if it were not otherwise represented in the negotiation of the settlement, there might be something to this contention. The corporation was a nominal defendant. It would have been the plaintiff if it had complied with the demand Rogers made that the corporation bring suit, before he instituted his shareholder's action. The owner of the

primary right, the corporation, refused to enforce that right, so Rogers, a shareholder, a member of the class that possessed the secondary right, brought his derivative action against the directors. In the negotiations for the settlement of the issues raised by the pleadings in the various actions, he represented the corporation. Meighan v. American Grass Twine Co., 2 Cir., 154 F. 346, 347. The corporation was properly and necessarily represented by him. He controlled the action. Brinckerhoff v. Bostwick, 99 N.Y. 185, 194, 1 N.E. 663; Hirshfeld v. Fitzgerald, 157 N.Y. 166, 51 N.E. 997, 46 L.R.A. 839; Ayer v. Kemper, 2 Cir., 48 F.2d 11, 14.

[15-17] The fact that an injunction pendente lite had been obtained, and was reinstated by the United States Supreme Court decision in the bonus action, was not such an adjudication of the controversy as would bar the plaintiff stockholder from settling the suit; nor was the ruling of the Supreme Court that the District Court had the right to inquire into the bonuses paid such an adjudication. No such inquiry was ever made. The action had not been prosecuted to judgment. If it had, Rogers would have "ceased to have control over it, because the rights of the other stockholders would at once have attached thereto". Brinckerhoff et al. v. Bostwick et al., 99 N. Y. 185, 194, 1 N.E. 663, 668. Further, if there were any basis for any such contention on petitioners' part, it would not raise any issue of fraud but a legal question purely, and petitioners' laches would bar any consideration of that point at this late date. Rogers could settle the litigation and he did, on terms he considered to be to the best interests of the corporation. That accounts for the recital in the second paragraph of Judge Caffey's decree of dismissal dated July 13, 1933. Judge Caffey very carefully wrote in a further recital, to wit:—"and no other person having

intervened or sought to intervene herein." This settlement was made years prior to the adoption of our new Federal Rules of Civil Procedure. Now, under Rule 23(c), a dismissal or compromise of a stockholder's action against directors cannot be had except upon the approval of the court and on notice to all other stockholders.

[18, 19] Counsel for applicants argue that Judge Caffey's decree of dismissal of July 13, 1933, should be set aside because the corporation improperly paid the fee of the attorneys for the defendant directors. Chadbourne, Stanchfield & Levy appeared as attorneys in this bonus action for both. For their legal services in this action and in the New Jersey and the New York Supreme Court action they received a fee of $320,000. Of that sum the individual defendant paid $96,000; the corporation paid the balance. Several lawsuits are now pending to recover the sum the corporation thus paid. Chadbourne, Stanchfield & Levy state that out of the sum paid to them they in turn paid special counsel on the appeals, such as John W. Davis and Nathan L. Miller, and that the corporation had the right to oppose plaintiff in these suits because there was involved therein the validity of Article 12 of the by-laws and also certain employee stock allotment plans which had been approved by the stockholders. Admittedly the corporation could not legally pay these attorneys for any services they rendered the directors in resisting the stockholders' suit. Apfel v. Auditore, 223 App.Div. 457, 228 N.Y.S. 489, affirmed 250 N.Y. 600, 166 N.E. 339; Monahan v. Kenny, 248 App.Div. 159, 288 N.Y.S. 323. The issues as to Chadbourne, Stanchfield & Levy's fee will have to be determined in other pending actions. But the facts alleged fall far short of a showing of any fraud which could form the basis for setting aside Judge Caffey's decree of dismissal of July 13, 1933.

[20] The attorney for Wile, in an affidavit filed on this motion, states that he makes the testimony of Levy, of Hahn and of Rogers, in the Levy disbarment proceedings, part of the record on these present applications. This cannot be done. None of the parties to this bonus action (except Hahn) had any right to cross-examine those witnesses in the Levy proceeding. On the argument of these motions I stated that all counsel might offer certain pages of the Levy record by referring to them specifically in their affidavits and briefs. There was no objection to that arrangement. But to offer great blocks of the Levy record is going beyond that ruling. The deposition of Rogers taken in a New York Supreme Court action on November 29, 1939, which the petitioners and parties in these present proceedings stipulated could be read in evidence in this proceeding, is in a different class. There is no such stipulation in respect to any of the testimony in the Levy disbarment proceeding. No request was made to take the testimony of any witness on these motions for leave to intervene, although the opportunity to do so was offered by the court.

As I stated above, the main question presented is should these applicants be permitted to intervene in this action. In my opinion they have not made out a case for intervention and their motions are accordingly denied. Submit orders on notice.